Supreme Court, U.S.
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No. 09-863

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RUSSO and JAMES GROSJEAN,

Petitioners,

v.

RODERICK O'NEAL and CHARLES POINTON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners incorrectly assert that the questions presented in this case are whether the Supreme Court of the State of Nevada erroneously applied discretionary immunity to a 42 U.S.C. § 1983 cause of action, and whether the Court validly declined to address a constitutional claim based on law of the case. Petitioners' Petition for Writ of Certiorari ("Pet.") at i. However, because the Nevada Supreme Court validly disposed of this matter under state-law claim preclusion principles, not law of the case principles; and, because under principles of judicial restraint a court should not decide a constitutional question if non-constitutional means validly dispose of a matter, the actual question presented for review is as follows:

Whether the Nevada Supreme Court properly affirmed, on the basis of state-law claim preclusion, a state district court's denial of Petitioners' post-dismissal motion to amend a civil complaint to include a claim pursuant to 42 U.S.C. § 1983 which was based on the same set of facts as the dismissed claims against Respondents.

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STATEMENT OF JURISDICTION

The Court does not have jurisdiction over this matter because Petitioners do not present a question of federal law. The Supreme Court of the State of Nevada properly affirmed the state district court's denial of Petitioners' post-dismissal motion for leave to amend their complaint on state-law claim preclusion principles. Therefore, Petitioners have not been denied the ability to assert any rights which they could have asserted based on the Constitution or federal statutes. *See* 28 U.S.C. § 1257.

Petitioners also state that the Nevada Supreme Court has decided an important question of federal law in a way that conflicts with a relevant decision of the Court. Pet. at 2; *see* Sup. Ct. R. 10(c). Petitioners assert that the Nevada Supreme Court did this by applying a discretionary immunity analysis to a 42 U.S.C. § 1983 claim, instead of a qualified immunity analysis. Pet. at 16-20. However, the Nevada Supreme Court did not apply any immunity analysis to § 1983 or analyze the merits of the § 1983 claim, as it did not need to address these questions based on its valid disposition of the matter on state-law claim preclusion grounds, as discussed below. Consequently, the decision of the Nevada Supreme Court only dealt with state law and its decision does not conflict with decisions of this Court.

Because Petitioners do not present a question concerning federal law, the Court does not have jurisdiction over this matter.

STATEMENT OF THE CASE

As they relate to Petitioners' Petition for Writ of Certiorari, the facts of this case are straightforward. On November 15, 2001, Petitioners filed a complaint against Respondents, and others, based on state-law causes of action. Pet. at 8. On May 9, 2002, a Nevada state district court dismissed all of Petitioners' claims against Respondents with prejudice. Pet. at 8, App. 32. Subsequently, Petitioners filed a motion for leave to amend their complaint to add a federal cause of action against the Respondents. Pet. at App. 50-51 (Motion for Reconsideration or Alternatively Certification Pursuant to NRCP 54(b), and Motion to Amend Complaint, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed May 28, 2002)). Without citing a reason, the district court denied Petitioners' post-dismissal motion for leave to amend their complaint against Respondents. Pet. at App. 31-33 (Order, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed August 15, 2002)). The proposed, additional federal claim was based on the same set of facts as the dismissed state claims. *See* Pet. at App. 6 (Order Affirming in Part, Reversing in Part and Remanding, *Russo v. State of Nevada/Nevada Gaming Control Board*, Case No. 46019 (Nev. July 30, 2009) ("Decision")); Pet. at App. 51-78 (Proposed Amended Complaint attached to Motion for Reconsideration or

Alternatively Certification Pursuant to NRCP 54(b), and Motion to Amend Complaint, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed May 28, 2002)).

Petitioners then appealed the dismissal of all claims against the Respondents to the Supreme Court of the State of Nevada. Pet. at 10. The Nevada Supreme Court affirmed the district court's dismissal of all claims against the Respondents. Pet. at 10. The Nevada Supreme Court declined to address the district court's denial of Petitioners' post-dismissal motion to amend their complaint to add a federal claim against Respondents. Pet. at 10. The remainder of Petitioners' claims, which were not against Respondents, proceeded to various final conclusions at the district court level. Pet. at 12-13.

Upon the remaining claims, asserted against other parties, reaching final, district court level conclusions, Petitioners appealed various matters to the Nevada Supreme Court, including the district court's denial of Petitioners' post-dismissal motion for leave to amend to add a federal claim against Respondents. Pet. at 12-13. The Nevada Supreme Court affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend to add a federal claim against Respondents on the grounds that state law claim preclusion principles prevented Petitioners from asserting a new claim against Respondents where all claims against Respondents had previously been dismissed and the

new claim arose out of the same set of facts as the dismissed claims.[1] Pet. at App. 5-7 (Decision).

Petitioners now attempt to appeal a decision validly grounded in state law to this Court.

ARGUMENT

In addition to the other bases discussed below, the petition for writ of certiorari should be denied because the petitioner neither shows nor argues how this case would have broad application or, indeed, any application at all beyond the particular facts and circumstances of this case. *See* Sup. Ct. R. 10. Furthermore, the petitioner points to no split of authority, nor any reason why this case is important enough to warrant this Court's attention. *See* Sup. Ct. R. 10. Any decision made by this Court would necessarily be limited to the particular facts and circumstances of this case and would have no application beyond its parameters. The only issue decided by the Supreme Court of the State of Nevada concerned the application of state law.

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[1] The Nevada Supreme Court also affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend to "clarify" the state claims against Respondents. However, this portion of the Nevada Supreme Court's decision, as well as the portion which allowed Petitioners to add two new state defendants, are not before the Court on the Petition for Writ of Certiorari.

CERTIORARI IS NOT WARRANTED BECAUSE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF NEVADA OF DENIAL OF LEAVE TO AMEND WAS BASED ON STATE-LAW CLAIM PRECLUSION AND DOES NOT PRESENT A FEDERAL QUESTION.

Petitioners attempt to argue that a federal question is presented because the Supreme Court of the State of Nevada did not address the merits of their proposed, new, post-dismissal amended complaint containing a claim arising under 42 U.S.C. § 1983. Pet. at 16-23. Petitioners further attempt to argue that state courts denied their post-dismissal motion for leave to amend their complaint by allegedly applying the wrong immunity test to find leave to amend would be futile. Pet. at 24-29.

However, the Nevada Supreme Court did not address the constitutional questions, either on their merits or through a discretionary immunity or qualified immunity analysis, because it was able to properly dispose of the matter on grounds of state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision). "It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Justice Brandeis, concurring)). The Nevada Supreme Court "will not consider constitutional issues which are not necessary to the determination of an

appeal." *Spears v. Spears*, 596 P.2d 210, 212 (Nev. 1979). The Nevada Supreme Court did not decide the matter based on a constitutional analysis because it was able to validly decide the matter based on state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision). As a result, based on the above quoted authority concerning judicial restraint, the Nevada Supreme Court did not and should not have analyzed potential constitutional questions when the matter was easily disposed of on other grounds.

CERTIORARI IS NOT WARRANTED BECAUSE THE SUPREME COURT OF THE STATE OF NEVADA VALIDLY AFFIRMED DENIAL OF LEAVE TO AMEND BASED ON STATE-LAW CLAIM PRECLUSION PRINCIPLES.

Petitioners misstate the grounds on which the Supreme Court of the State of Nevada disposed of their post-dismissal motion for leave to amend their complaint to add a federal claim. Petitioners claim that the Nevada Supreme Court denied their appeal based on law-of-the-case principles. Pet. at 24-29. Petitioners' mischaracterization relies on the following quote from the Nevada Supreme Court's opinion taken out of context: "[a]fter rehearing was denied and remittitur issued, the dismissal order in favor of the State and [Respondents] became final. . . . That decision stands as the law of the case. . . ." Pet. at 25. Petitioners failed to apprise the Court of the

end of the quote and the ground upon which the Nevada Supreme Court disposed of the matter:

> [A]nd its *finality precludes* the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint." *Id.* [18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4432, at 197 (2d ed. 2002)]; *see Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 171, 400 P.2d 621 625 (1965).

Pet. at App. 6 (Decision) (emphasis added). Thus, the Nevada Supreme Court's opinion reveals on its face that affirmance of the district court's denial of Petitioners' motion was grounded on state-law claim preclusion principles, not law-of-the-case.

Based on Petitioners' mischaracterization of the grounds on which they lost their appeal, Petitioners argue that the Nevada Supreme Court did not validly apply law-of-the-case principles. The argument is impertinent. In addition, Petitioners do not argue the Nevada Supreme Court's application of state-law claim preclusion in dismissing their appeal. *See* Pet. at 1-30. Petitioners also do not argue that their proposed 42 U.S.C. § 1983 claim is not based on the same set of facts as their dismissed claims against Respondents. *See* Pet. at 1-30. In fact, Petitioners do not even address the Nevada Supreme Court's state-law claim preclusion analysis in their Petition for

Writ of Certiorari. *See* Pet. at 1-30. The Nevada Supreme Court affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend their complaint to add a federal claim based on a valid application of state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision).

The Nevada Supreme Court directly addressed Petitioners' contentions concerning the propriety of answering constitutional questions regarding Petitioners' proposed 42 U.S.C. § 1983 claim against Respondents by indicating answering such questions was foreclosed because of claim preclusion principles:

> [Petitioners] argue that the district court should have reconsidered its August 23, 2002, order dismissing the State and [Respondents] from the action on immunity grounds and allowed them leave to amend the complaint to proceed with their state law tort and civil rights claims, and the proposed § 1983 claim, against those parties. As explained below, however, *preclusion* principles apply to foreclose such claims.

Pet. at App. 5 (Decision) (emphasis added).

The Nevada Supreme Court discussed how it was required to affirm the district court's denial Petitioners' post-dismissal motion: "[W]hen a judgment concludes a case between opposing parties,

it disposes of not just the causes of action actually pleaded, but all available grounds of recovery arising from the same core facts." Pet. at App. 5 (Decision) (citing *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)). "'[W]hen properly entered, [Rule 54(b)] judgments are final for purposes of preclusion as well as appeal. . . .'" Pet. at App. 6 (Decision) (parenthetically quoting 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4432, at 58-59 (2d ed. 2002)). "A dismissal with prejudice is a final judgment on the merits, preclusive of new causes of action based on the same factual scenario." Pet. at App. 6 (Decision) (parenthetical discussion of *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 400 P.2d 621, 625 (Nev. 1965)).

> When a trial court dismissed the plaintiffs' claims against certain defendants, certifying that dismissal as final under Rule 54(b), and the Court of Appeals affirmed that order, the plaintiffs could not, in an amended complaint, rename those parties as defendants because the plaintiffs' claims were already dismissed in a final judgment.

Pet. at App. 6-7 (Decision) (parenthetically discussing *Keams v. Tempe Technical Institute, Inc.*, 16 F.Supp. 2d 1119, 1121 n.2 (D. Ariz. 1998)).

Based on this discussion the Nevada Supreme Court found that Petitioners' post-dismissal motion

for leave to amend was precluded under state-law claim preclusion principles:

> In their petition seeking rehearing, [Petitioners] acknowledged that the district court's finality certification applied to parties in the case, i.e., the State and [Respondents], and that all orders concerning those parties merged into the order dismissing them, including the subsequent order denying leave to amend the complaint to reassert the state law claims and to add a § 1983 claim against them. After rehearing was denied and remittitur issued, the dismissal order in favor of the State and [Respondents] became final. . . . That decision stands as the law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint."

Pet. at App. 6 (Decision) (citations omitted, but discussed above). In short, Petitioners' claims against Respondents were dismissed by the district court, the district court certified the dismissal as final, the Nevada Supreme Court affirmed the dismissal of all of Petitioners' claims against Respondents,[2] and, thus,

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[2] This affirmance refers to the Nevada Supreme Court's affirmance of the dismissal of the claims against Respondents of November 15, 2004, and not the July 30, 2009, Nevada Supreme Court Order affirming the district court's denial of Petitioner's

new claims arising from the same factual scenario are precluded based on state-law claim preclusion principles.

PETITIONERS' ARGUMENTS THAT THE SUPREME COURT OF THE STATE OF NEVADA ERRED ARE STRAW-MAN ARGUMENTS NOT BASED ON THE SUPREME COURT OF THE STATE OF NEVADA'S DECISION.

Petitioners, without addressing the Supreme Court of the State of Nevada's state-law claim preclusion analysis, try to claim that the Nevada Supreme Court invalidly applied law-of-the-case doctrine to deny Petitioners' appeal. However, while it mentioned law-of-the-case, the Nevada Supreme Court denied Petitioners' appeal based on state-law claim preclusion principles, not law-of-the-case. *See* Pet. at App. 5-7, 22 (Decision).

The Nevada Supreme Court discussed law-of-the-case only in the context of its previous decision creating a final dismissal of all of Petitioners' claims against Respondents. That is, the Nevada Supreme Court discussed law-of-the-case in passing only to show that the dismissal of the claims against Respondents was final and, thus, any new claims against Respondents are precluded based on state-law preclusion principles. *See* Pet. at App. 6 (Decision).

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post-dismissal motion for leave to amend to add a 42 U.S.C. § 1983 claim against Respondents that is the subject of Petitioners' current Petition for Writ of Certiorari.

Petitioners contend the Nevada Supreme Court's passing reference to law-of-the-case to show the finality of the previous dismissal of claims against Respondents was using law-of-the-case doctrines to rule on a qualified immunity analysis. Pet. at 26. This contention is patently unfounded. Other than to state that it was not reaching constitutional questions involving Petitioners' proposed, new § 1983 claim because the matter was validly disposed of on other grounds, the Nevada Supreme Court did not mention Petitioners' § 1983 claim. *See* Pet. at App. 5 (Decision). The Nevada Supreme Court never mentioned § 1983 in the context of law-of-the-case. *See* Pet. at App. 5 (Decision). Thus, it is unclear how Petitioners' arguments regarding law-of-the-case relate to the matter presently before the Court.

Petitioners' arguments are not grounded in the facts and law addressed by the decision of the Nevada Supreme Court concerning which Petitioners have filed their Petition for Writ of Certiorari, and, thus, do not warrant the Court granting their Petition for Writ of Certiorari.

PERCEIVED MISTATEMENTS MADE IN THE PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 15(2) admonishes counsel "that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15(2). Respondents therefore point out Petitioners' misstatements below.

These factual misstatements by Petitioners find no support in the record:

1) That the Nevada Supreme Court decided this matter based on law-of-the-case. Pet. at 4, 5, 14.
2) That the Nevada Supreme Court "intentionally protected state police agents who blatantly violated Petitioners' constitutional rights by manufacturing evidence with an ulterior purpose of recouping gaming losses for a casino through charging Petitioners with a crime they never committed. The Nevada Courts are protecting reprehensible police misconduct by repeatedly failing to apply the test for qualified immunity to the federal cause of action." Pet. at 4.
3) That the district court stated any reason, including discretionary immunity, for denying Petitioners' post-dismissal motion for leave to amend to add a § 1983 claim. Pet. at 5, 9, 14, 16, 17, 18, 29.
4) That "the allegations concerning the falsity of [Respondents'] reports were subsequently proven true . . ." by a memo disclosed subsequent to the dismissal of all of Petitioners' claims against Respondents. Pet. at 11.
5) That the Nevada Supreme Court's mention of the doctrine of law-of-the-case in passing was in any way related to a finding concerning discretionary immunity applied to a proposed § 1983 claim. Pet. at 15, 16, 18, 20.

6) That the Nevada Supreme Court's mention of the doctrine of law-of-the-case in passing was in any way related to a finding concerning qualified immunity. Pet. at 18, 26.
7) That there is an irreconcilable conflict in the Nevada Supreme Court's decision concerning Respondents and the Gaming Control Board agents, who had previously not been named in Petitioners' action, that the Nevada Supreme Court allowed Petitioners to add to their complaint. Pet. at 19-20.
8) That Respondents violated any of Petitioners' constitutional rights. Pet. at 21.
9) That Respondents fabricated any facts. Pet. at 21, 23.
10) That the Nevada Supreme Court decided this matter primarily on the doctrine of law-of-the-case. Pet. at 26.
11) That Respondents fabricated evidence and reports, declined to enforce gaming laws, and were the "private enforcement arm of the casinos." Pet. at 28.
12) That Respondents acted in concert with casinos to deprive patrons of their lawful winnings. Pet. at 28.
13) That "[t]he secrecy in this case also evinces that the [Nevada Supreme Court] is applying state rules to try to protect errant agents and not for a valid reason." Pet. at 28.

Certain opinions expressed by Petitioners that might be construed as misstatements are as follows:

1) That the Nevada Supreme Court engaged in unfounded legal maneuverings. Pet. at 4.
2) That Nevada "state courts applied convoluted reasoning to protect state police officers from liability on a federal claim (and as a corollary, protect gaming licensees from legitimate losses)." Pet. at 8.
3) That the Nevada Supreme Court applied any methods in this case to avoid and delay issues in the hope that they would go away. Pet. at 10.
4) That said memo "confirmed [Respondents'] lack of evidence and an ulterior purpose with charging Petitioners with a crime." Pet. at 11.
5) That a jury verdict against the defendants remaining in the matter after all of Petitioners' claims against Respondents were dismissed confirmed that evidence was fabricated. Pet. at 12.
6) That the Nevada Supreme Court "played games" in declining to address the potential constitutional questions Petitioners attempted to raise. Pet. at 15, 28.
7) That the Nevada Supreme Court protected Respondents from § 1983 liability "[b]y bastardizing the proceedings in this matter without a valid excuse..." Pet. at 16.
8) That the Nevada Supreme Court "relied on grounds that are not fair or valid under state law or logic" in reaching its result. Pet. at 16, 24, 25, 28.

9) That the Nevada courts erred in not analyzing constitutional questions of qualified immunity in this matter. Pet. at 16.
10) That the proposed amendment concerning adding a § 1983 action against Respondents was not futile. Pet. at 20.
11) That the facts Petitioners proposed be added to their complaint would have shown no reasonable officer would believe a felony offense had occurred. Pet. at 22.
12) That the Nevada Supreme Court used invalid excuses "to prevent Petitioners from exercising their constitutional rights. . . ." Pet. at 25.
13) That the Nevada Supreme Court declined to publish its opinion concerning respondents so "that the matters concerning the gaming agents would remain secret. . . ." Pet. at 29.
14) That the Nevada Supreme Court avoided considering the merits of Petitioners' proposed § 1983 claim against Respondents "by circuitous reasoning and not with a valid excuse." Pet. at 29.

CONCLUSION

The Court should not grant Petitioners' Petition for Writ of Certiorari. The decision of the Supreme Court of the State of Nevada was grounded in state law and does not present a federal question. The Nevada Supreme Court's decision validly

affirmed denial of leave to amend based on state-law preclusion principles. Petitioners only present a law-of-the-case straw-man argument to try to defeat the validity of the Nevada Supreme Court's decision. Thus, the Court should not grant Petitioners' Petition for Writ of Certiorari in the above captioned matter.

Respectfully submitted.

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